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In The

Supreme Court of the United States

October Term, 1972

No. 72-1496

FRANK R. MADERA,

Petitioner,

vs.

BROOKLYN BAR ASSOCIATION,

Respondent.

PETITIONER'S REPLY BRIEF

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CONTRARY TO THE CONTENTION OF THE BAR ASSOCIATION THAT IT CALLED MADERA, AND HE TESTIFIED, CONCERNING ONLY TWO (2) OF THE SEVEN (7) COMPLAINTS OR CHARGES, THE ASSOCIATION CALLED MADERA, AND HE TESTIFIED, CONCERNING FOUR (4) OF THE COMPLAINTS

(replying to Bar Association's brief, pp. 1-2, and p. 2)

In an apparent effort to minimize the impact of the deprivation of Madera's

Fifth Amendment rights--which relate to four (4) of the seven (7) charges in the case--the Bar Association ("Association"), in its brief (pp. 1-2, and 2), states (a) that it called Madera as a witness in chief with respect to only two (2) of the seven (7) complaints, and (b) that his "testimony applied to only two of the complaints" (brief, p. 2)--meaning, presumably, the two complaints referred to above.

In support of its contention that it called Madera as a witness with respect to only two of the complaints, the Association cites p. A-257 of petitioner Madera's Appendix. In support of its claim that Madera's testimony applied to only two of the complaints--presumably, the two complaints referred to above--the Association, however, furnishes no supporting reference.

With respect to page A-257 of the Appendix, that portion of the record discloses that counsel for the Association, at the hearings before Mr. Justice Wegman, stated that he intended to call Madera as a witness in chief, on behalf of the Association, with respect to "the Sobral and Pedretti complaints." (SA-5 to SA-6).

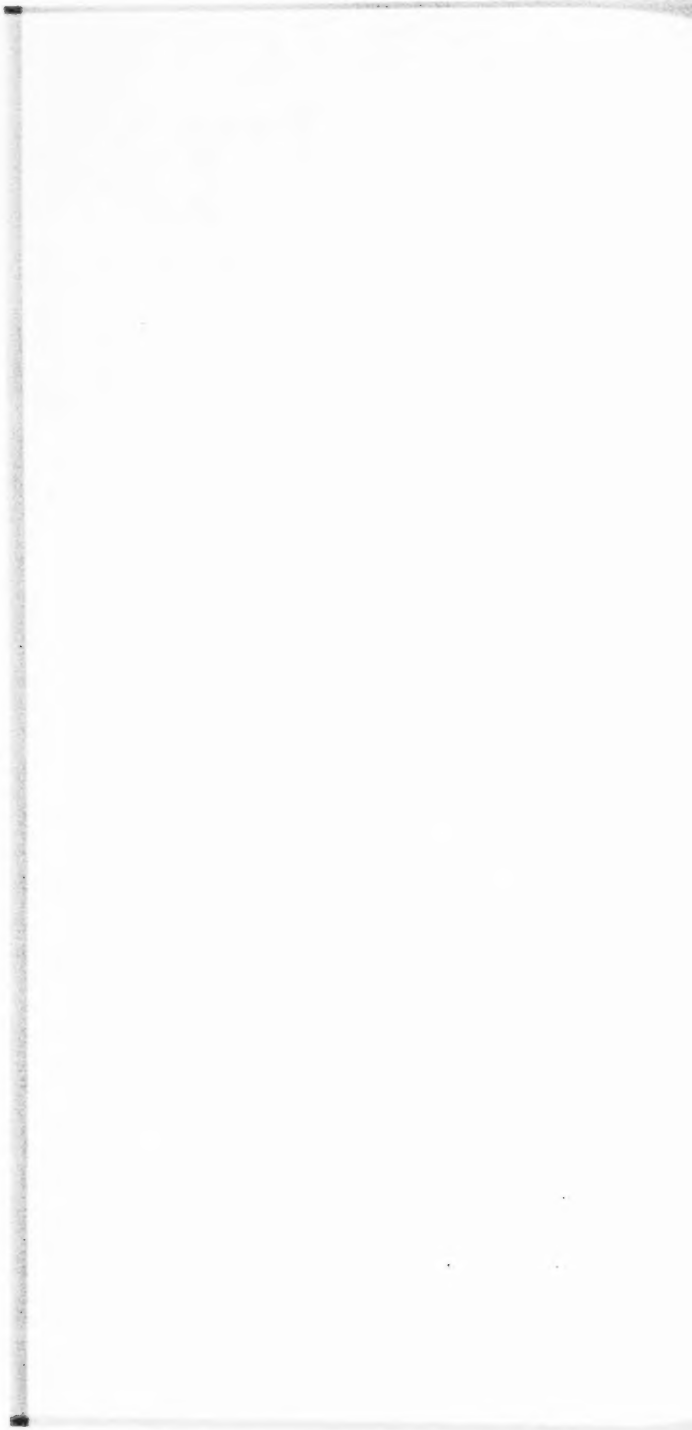
The "Sobral" complaints were three (3) in number (A-26 to A-29). The Association, however, presented evidence--with the exception of the evidence given by Madera as its witness--as to only one of these three complaints: namely, the one relating to a Myrtle Avenue property (petition herein, p. 20, footnote, item "(3)", cf. A-26 to A-27). It did not present evidence--except through Madera--as to two (2) of the three (3) complaints: i.e. the Bristol Street property complaint (A-26 to A-28), and the President Street property

complaint (A-28 to A-29). See petition herein, p. 30; cf. p. 20, footnote, ibid.

The Pedretti complaints were two (2) in number (A-29 to A-31). The Association did not present any evidence--except through Madera--as to either of these (petition herein, p. 31, to be read with p. 30).

Thus, it appears that the Association failed to present--except through Madera--any evidence as to four (4) of the seven (7) charges in the petition.

Accordingly, there is no merit to the claim of the Association that it called Madera as a witness in chief, and he testified, with respect to only two (2) of the seven (7) complaints. The fact is that it called him and he testified concerning four (4) complaints.



THE BAR ASSOCIATION'S GROUNDLESS CLAIM THAT IT HAD NOT PRODUCED EVIDENCE CONCERNING CERTAIN CHARGES AND HAD HAD TO CALL MADERA TO SUPPLY SAID EVIDENCE, BECAUSE HE HAD BROUGHT ABOUT THE NON-APPEARANCE OF THE COMPLAINANTS WHO MADE SAID CHARGES

(replying to the Bar Association's brief, p. 2)

In an apparent effort to refute the showing in the petition herein that Madera testified for the Association under constraint of Mr. Justice Wegman's ruling and clearly implied threat that if Madera invoked the Fifth Amendment and refused to testify, Mr. Justice Wegman would find him guilty of the four (4) charges as to which the Association desired to call him as a witness (and as to which no evidence had been introduced), the Association, in its brief (p. 2), states that

"...it became necessary to call petitioner because he himself had bought off the complainants by satisfying their complaints (A 285-7)", by making restitution, and had thus, presumably, brought about their non-appearance.

The Association's claim is contrary to the facts, and is, moreover, wholly incompatible with another contention made by the Association in its brief before this Court, to the effect that Madera was required to make restitution (brief, p. 4). The facts are these:

(1) At the hearings before Mr. Justice Wegman, counsel for the Association stated in open court that he was not claiming either (a) that the non-appearance of the two complainants (Sobral and Pedretti), concerning whose charges (four in number) the Association had presented no evidence, was due to anything

specific Madera had done, or that Madera had done anything improper in any respect in contacting the complainants since the inception of the proceedings (SA -2 to SA-3).* During these contacts, Madera had apparently made restitution to the complainants (A-285 to A-287; A-138). As already noted, the Association, in its brief before this Court, states that Madera was required to make said restitution (brief, p. 4).

(2) Mr. Justice Wegman, at the hearings before him, agreed with the statement of Madera's counsel that there was nothing wrong in Madera's talking to the complainants (since the inception of the proceedings), and, in fact, went on to say that

---

*Numbers, preceded by "SA", refer to pages of petitioner's Supplemental Appendix annexed hereto.

"...there would be something wrong if he didn't" (SA - 4).

(3) The Association's charge that the non-appearance of the complainants Sobral and Pedretti had been due to the fact that Madera had "bought off" the complainants by satisfying their complaints (by making restitution), is, as already indicated, completely inconsistent with its position presented elsewhere in its brief before this Court, that Madera was required to make such restitution (brief, p. 4).

(4) The non-appearance of the complainants Sobral and Pedretti, as the Bar Association acknowledged at the hearings, was not due to any improper conduct on the part of Madera, but was the result of the Association's failure to compel said appearance by subpoena (SA - 3 ; A-259 to A-260; See Spevack v. Klein, 385 U.S. 511).

It thus appears that there is no merit to the Association's contention thatit was compelled to call Madera because he had "bought off" the complainants by satisfying their complaints (by making restitution). Indeed, as noted, the contention is completely at variance with contrary positions taken by the Association at the hearing, as well as Mr. Justice Wegman's comments, and is also inconsistent with the Association's position in its brief before this Court.

THE BAR ASSOCIATION'S GROUNDLESS CONTENTION THAT THE DEPRIVATION OF MADERA'S FIFTH AMENDMENT RIGHTS WAS CURED BY THE FACT THAT MR. JUSTICE WEGMAN--WHO, INCIDENTALLY, ACTED AS A REFEREE TO HEAR AND REPORT ONLY-- HAD FOUND IN MADERA'S FAVOR ON THE "FIFTH AMENDMENT" CHARGES

(replying to the Association's brief, p. 2)

In its brief (pp. 2 and 3), the Bar

Association argues--at least inferentially--that any deprivation of Madera's Fifth Amendment rights was in fact nullified by the fact that Mr. Justice Wegman subsequently found in Madera's favor on the charges as to which Madera testified as a witness in chief for the Association (under constraint of Mr. Justice Wegman's ruling concerning the Fith Amendment).

The argument is without merit in view of the fact that Mr. Justice Wegman was acting as a referee to hear and report only (A-74 to A-75, A-78), and the Appellate Division--which had the power to accept or reject Mr. Justice Wegman's findings and report, and rejected the latter's findings and report as to said "Fifth Amendment" charges--based its order of disbarment, in material part, upon the evidence Madera gave as to said charges--the only evidence on said charges. This is

shown by the fact that the Appellate Division found Madera guilty of said charges (as well as the other charges), and directed his disbarment because of his guilt of said (and the other) charges. (A-143 to A-145; cf. Association's petition, A-25 to A-33).

CONTRARY TO THE BAR ASSOCIATION'S CONTENTION, THE FIFTH AMENDMENT QUESTION WAS SEASONABLY RAISED IN ACCORDANCE WITH NEW YORK PRACTICE

(replying to Bar Association's brief, p. 3)

In its brief, the Association states (p. 3), in reference to Madera's papers:

> "Nowhere in his papers (A 126-139) is there any contention that any person infringed on his constitutional rights". (brief, p. 3).

The pages referred to--namely, A 126-139--constitute, together with A-125, Madera's statement in support of his cross-motion, made in the Appellate Division, to confirm

Mr. Justice Wegman's report insofar as it found six (6) charges--including the four (4) as to which Madera testified for the Association--not to have been sustained, and to disaffirm the report insofar as it found one of the charges to have been sustained.

While Madera, in said statement, did not raise the Fifth Amendment issue, the issue was, however, as pointed out in the petition herein (pp. 38-40), asserted (a) at the hearings before Mr. Justice Wegman, and there by Mr. Justice Wegman, as well as counsel for both sides, (b) on Madera's motion in the Appellate Division to vacate the order of disbarment, (c) on Madera's motion in the Appellate Division for leave to appeal to the Court of Appeals from the order of disbarment, and (d) on Madera's appeal to the Court of Appeals from the order of disbarment taken as of right, on constitutional questions.

In connection with Madera's motion in the Appellate Division to vacate the order of disbarment, it should be noted that the Court of Appeals of the State of New York holds that a constitutional question has been properly and timely raised if it is asserted--as it was in the case at bar--on a motion made in the Appellate Division--after a final determination by said court--to vacate said determination. Matter of Department of Public Parks, 85 N.Y. 459, 464, cited, Cohen & Karger, Powers of the New York Court of Appeals (rev. ed., 1952), sec. 169, p. 642, note 56.

THE FULL EXTENT (NOT REFERRED TO IN THE PETITION HEREIN) OF THE COERCIVE IMPACT UPON MADERA OF MR. JUSTICE WEGMAN'S RULING AND CLEARLY IMPLIED THREAT CONCERNING THE EFFECT THAT SAID JUSTICE WOULD GIVE TO ANY INVOCATION BY MADERA OF THE FIFTH AMENDMENT

So coercive was the impact upon Madera of Mr. Justice Wegman's ruling and clearly implied threat that if Madera invoked the Fifth Amendment and remained silent as to the charges concerning which the Association called him as a witness, said Justice would find him guilty of said charges, that Madera not only relinquished his right to remain silent and testified for the Association, but, in addition, after doing so, he tried -- unsuccessfully--to have excluded from evidence

the fact that he had, prior to the hearings before Mr. Justice Wegman, in proceedings before the Bar Association concerning said (and other) charges, invoked the Fifth Amendment and remained silent. (A-301 to A-307, to be read with A-8 to A-19). More particularly, after Madera had decided not to assert his Fifth Amendment privilege to remain silent, and had testified for the Association, the latter offered in evidence the letter which Madera had written (A-14 to A-19) in response to the Association's notice of meeting (A-8 to A-11) and subpoena (A-12 to A-13) concerning the charges as to which he had just testified, as well as other charges (A-301).

The unmistakable purpose of the offer was to prejudice Madera before Mr. Justice Wegman by showing that, notwithstanding Madera's decision not to invoke the Fifth

Amendment at the hearings before Mr. Justice Wegman and his testifying for the Association, nevertheless, Madera had failed to cooperate with the Association by declining to appear at the Association's meeting, but, instead, had transmitted to it a letter stating (A-305 to A-306) that he invoked the Fifth Amendment under Spevack v. Klein, supra, in lieu of appearing (A-305, to be read with A-302 to A-305).

Madera's counsel objected to the admission of the letter (A-302, A-303), pointing out that Madera had, at the hearings before Mr. Justice Wegman, testified as to the charges (A-304) (albeit as a witness for the Association, under constraint of Mr. Justice Wegman's ruling and clearly implied threat to find Madera guilty if he asserted the privilege of the Fifth Amendment and reamined silent.)*

*footnote on next page

*Subsequently, Mr. Justice Wegman, while not admitting the letter in evidence, did, however, rule that the record would show that Madera had been subpoenaed to appear before the Association's grievance committee, but had refused to do so, asserting, instead, the claim of privilege (under the Fifth Amendment) in accordance with Spevack v. Klein, supra (A-306).

Clearly, the objection of Madera's counsel to the admission of Madera's Fifth Amendment letter was prompted by the fear that, notwithstanding the fact that Madera had not invoked the Fifth Amendment at the hearings, but had, instead, testified for the Association, Mr. Justice Wegman might, in his findings and report as to Madera's guilt of the charges as to which the Association called Madera as a witness, take into consideration the fact that Madera had previously failed to cooperate with the Association, by invoking said Amendment and remaining silent.

The foregoing vividly demonstrates the full extent of the coercive impact upon Madera of Mr. Justice Wegman's Fifth Amendment ruling and threat.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals of the State of New York.

Respectfully submitted,

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Counsel for Petitioner

June 12, 1973.

SUPPLEMENTAL APPENDIX

(p. 98) THE COURT: I know, but I have no idea what it is that Mr. Kaplan has in mind. He may have a very specific purpose in wanting to call the respondent at this particular point rather than to wait until the other witnesses have testified. I don't know and I don't intend to ask him to inform me privately about it because I don't believe in an adversary proceeding that would be proper.

MR. KAPLAN: I have no objection to telling the reason, your Honor, and I have no objection to telling your Honor what I have in mind. I don't know if Mr. Slavin would like it if I do it, but I will be glad to tell you if you want to hear it.

THE COURT: I don't know if Mr. Slavin will like or dislike anything you say, but

I am sure that Mr. Slavin knows there isn't anything a counsel can say in a proceeding (p. 99) of this nature that would have any prejudice or effect. If there were a jury here, it would be one thing, but I assure you the Court would not be influenced by any statement that was regarded by the other side as an improper statement.

MR. KAPLAN: Judge, I think I should tell you then that I have got two missing witnesses, Sobral and Pedredi. I spoke to Mrs. Sobral last night and I spoke to Mr. Pedredi this morning. Now, to be as precise as possible, I don't want to convey to you anything Mr. Madera has done has resulted specifically in these witnesses failing to appear. However, I do know that he has been in contact with them since the inception of the proceeding, and the contact he has had with them has resulted in a non-appearance in some general way. I am not saying anything

he has done has been improper in any respect in connection with his contact with them. Both of them promised me they would be here. Neither of them kept their commitment. If it is going to come to that, I am going to have to ask the Court's help in getting warrants of arrest.

(p. 100) THE COURT: Did you serve a subpoena?

MR. KAPLAN: I didn't serve them. Both of them gave me their commitment, and in an effort to get to some point where this proceeding is going to terminate, and rather than serve subpoenas, which I have to get the Appellate Division to issue, and ask the Appellate Division to order warrants of arrest, or something of that nature--I am trying to provide the missing testimony through the respondent in the interest of conserving the time that would otherwise be involved, and that's the reason why I am calling the respondent.

THE COURT: Mr. Slavin, I would like to have you tell me whether your client, the respondent, has had any communication, directly or indirectly, with or from either of these two individuals since yesterday?

MR. SLAVIN: Since yesterday? No.

MR. KAPLAN: I don't say that he has spoken to them since yesterday. He has, however, spoken to them since the inception of this proceeding.

MR. SLAVIN: There is nothing wrong with a man--

(p. 101) MR. KAPLAN: I don't say there is anything wrong with it. I don't charge him with anything.

MR. SLAVIN: Mr. Kaplan, and I say Jerry, because you are a friend of mine, I can tell you there is nothing wrong with the respondent talking with people--

THE COURT: Of course there isn't. There would be something wrong if he didn't.

MR. SLAVIN: That's correct, sir.

THE COURT: But the point is that the witnesses who assured Mr. Kaplan they would be here are not here and their absence--

MR. SLAVIN: If your Honor wishes, I will ask Mr. Madera now under oath to state to you--

THE COURT: That's unnecessary. He has stated he has no communication with them or from them since yesterday, so that eliminates anything as to his being able to offer any reason that he might know for their failure to appear. He knows there is no reason why they didn't appear, since he didn't hear from them since yesterday.

MR. KAPLAN: I intend to call him. If he is going to assert his privilege on the Fifth Amendment, (p. 102) it's then going to become necessary for me to do something else to provide the gap in the testimony.

I intend to call him as a witness in chief on behalf of the petitioner with respect to the Sobral and Pedredi complaints.